BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH E. BOUCHER	)	
Claimant	)	
V.	)	
	)	
OSBORNE INDUSTRIES, INC.	)	
Respondent	)	Docket No. 1,059,579
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant requested review of Administrative Law Judge Bruce E. Moore's March 3, 2014 Award. The Board heard oral argument on July 8, 2014.

APPEARANCES

Jeff K. Cooper of Topeka appeared for claimant. Jeffrey E. King of Salina appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties stipulated claimant has an overall 20% permanent impairment of function involving his low back, as well as a 10% preexisting permanent impairment of function. The parties also agreed the Board, if necessary, may take judicial notice of the AMA *Guides*.[1]

ISSUES

The judge found claimant's December 30, 2011 accident was the prevailing factor in causing his injury. The judge concluded claimant had a 32% work disability award based on imputing to claimant the ability to earn $9.43 per hour for a 28% wage loss and a finding that claimant sustained a 36% task loss.

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant requests the Award be modified. He disputes having the post-injury ability to earn $9.43 per hour in a full-time job. Claimant argues his imputed wage should be significantly lower or that his wage loss should be based on his actual post-injury earnings, which he asserts average to being $2.50 per week. Claimant also contends his severe restrictions eliminate him from any reasonable employment, such that he is permanently and totally disabled.

Respondent requests the Award be reversed, arguing claimant's accident was not the prevailing factor in causing his injury, need for treatment and permanent impairment. Rather, respondent asserts the combination of claimant's prior low back injury and prior surgery was the prevailing factor. In the alternative, respondent asserts the work disability should be based only on wage loss, asserting no task loss exists based upon Dr. Manguoglu's testimony.

The issues for the Board's review are:

1. Was claimant's accident the prevailing factor in causing his injury, medical condition and disability;

2. What is the nature and extent of claimant's disability; and

3. Is claimant entitled to future medical?

FINDINGS OF FACT

Claimant worked for respondent as a tech man lift gluer. His job duties included sanding fiberglass man lift buckets, as well as gluing steps and brackets onto the buckets.

This case concerns a December 30, 2011 work accident. However, claimant had a prior low back injury. In December 2010, he was lifting a bucket for respondent when he felt a sharp pain in his back and immediate pain radiating down his left leg.[2] An MRI revealed a herniated disk at L4-5. On April 7, 2011, claimant underwent a microdiskectomy by Ali B. Manguoglu, M.D., a board certified neurosurgeon. A repeat MRI performed in August 2011 revealed epidural fibrosis, or scar tissue, but no new herniation. Claimant testified while the surgery relieved his leg pain, he continued to have complaints of low back and hip pain. Dr. Manguoglu referred him to Adeleke Badejo, M.D., for a second opinion. According to claimant, Dr. Badejo told him his back was fine and he just needed to "buck up and go back to work."[3]

---

[2] While claimant contends this injury was work related, he did file nor assert a workers compensation claim, and used his private health insurance to pay for treatment.

[3] P.H. Trans. at 20.

In October 2011, Dr. Manguoglu released claimant from treatment. According to claimant, Dr. Manguoglu did not provide written restrictions, but told him to use proper body mechanics, keep his back straight, use his legs when lifting and not bend over to grab anything heavy. Dr. Manguoglu testified he had an October 6, 2011 note recommending claimant could lift 20 to 50 pounds.[4] Dr. Manguoglu also testified his "standard" restrictions normally or usually imposed after a microdiskectomy include avoidance of repetitive bending and twisting and to alternate positions.[5]

While claimant was unsure whether he advised respondent of Dr. Manguoglu's restrictions, respondent returned claimant to work in a light duty position. When the worker that took over claimant's prior duties became unreliable, respondent asked claimant to return to his former position. Claimant agreed and respondent assigned another employee to help him with heavier tasks. It is unclear from the record how long claimant performed his regular job before the accident. While claimant continued to take medication for low back and left hip pain, he denied any leg pain between October 2011 and December 2011.

On December 30, 2011, claimant glued a bracket on the side of a bucket and left to do paperwork. When he returned, he noticed the bracket was crooked. Because the average glue set up time of 15 to 20 minutes had not elapsed, claimant attempted to straighten the bracket. While standing in front of the chest-level bucket, he grabbed the bracket with his right arm fully extended and his left arm closer to his chest. He twisted his body while exerting as much force as he could muster and immediately felt a sharp, stabbing pain in his lower back. Claimant testified the pain was different than any pain he had felt before.

The next working day, claimant was only able to work an hour because of pain. He reported the injury to his supervisor. He was referred for treatment with Tim Seifert, P.A., and later John Ciccarelli, M.D. About a week after the accident, he began experiencing pain radiating down his left leg. An MRI showed an L4-5 disk injury.

Claimant was returned to the care of Dr. Manguoglu on April 2, 2012. Dr. Manguoglu noted the MRI showed "a recurrent disc herniation at the same level where he had the previous surgery."[6] Physical examination revealed positive straight leg raising about 80° on the left and negative on the right, and diminished knee and ankle reflexes, yet normal strength. Dr. Manguoglu diagnosed claimant with recurrent left L5 radiculopathy secondary to recurrent disk herniation at L4-5 with epidural fibrosis. Dr. Manguoglu performed a second microdiskectomy on April 25, 2012.

---

[4] Manguoglu Depo. at 17, 24. This document is discussed by Dr. Manguoglu, but it was not placed into evidence.

[5] *Id*. at 17.

[6] *Id*. at 7.

On April 10, 2012, claimant was seen at his attorney's request by Paul S. Stein, M.D., a board certified neurosurgeon. Claimant reported lower back pain radiating into the left thigh which he rated as an 8 on a scale of 0-10. Dr. Stein reviewed a lumbar myelogram/CT scan dated March 14, 2011 which showed a left L4-5 foraminal disk protrusion with possible osteophyte, a lumbar MRI dated August 17, 2011 which showed no definite recurrent disk herniation and a lumbar MRI dated January 20, 2012 which showed a large left recurrent disk herniation at L4-5. Physical examination revealed no lower extremity atrophy or dermatomal sensory deficit and no paraspinal muscular spasm in the lumbar spine. Dr. Stein noted some tenderness to palpation along the lower incision, moderately restricted range of motion and somewhat positive sitting and supine straight leg raising on the left.

In his April 10, 2012 report, Dr. Stein also addressed causation:

> [Claimant] had a history of lower back and left lower extremity pain for which he underwent a left L4-L5 partial diskectomy in April of 2011. There was some improvement although he was not fully asymptomatic prior to return to work at Osborne Industries in October of 2011. He has suffered a recurrent disk herniation on or about 12/30/11 while pulling on an object at work. Although the incident at work precipitated the recurrent disk herniation the prevailing factor in the current symptomatology and need for additional surgery is the preexisting L4-L5 disk disease and prior surgery.[7]

In response to a letter from claimant's counsel, Dr. Stein issued an addendum report dated May 27, 2012, which stated:

> I do not disagree with the fact that there was a new injury which resulted in a large recurrent disk herniation. Much has been made of the lumbar MRI scan after surgery but prior to the work incident showing no evidence of recurrent disk herniation. I do not doubt that the recurrent disk herniation requiring a second surgery occurred during the physical effort described at work. This is an instance where there are two major factors associated with the current clinical situation. The first factor is the previous and relatively recent surgery which predisposes the individual to a disk recurrence. The second major factor is the amount of stress and force upon that disk during the work incident which led to the disk rupturing a second time. Because such recurrences can occur with or without such additional stress, it was my opinion in my report of 4/10/12 that the prevailing or most important factor was the preexisting status. Perhaps that was premature given the fact that we are now facing legal definitions of medical issues and the definition of such issues has not yet been completely determined. Therefore, I will provide the medical information and allow the legal system to make the final determination.

---

[7] Stein Depo., Ex. 2 at 13.

> It remains my opinion that the particular activity at work would not likely have caused a rupture in a normal disk. However, I cannot state with certainty that the disk would have herniated absent that activity and stress. The statistics state that the likelihood would have been 5-10 percent. It is my opinion that the physical stress exerted at work caused a rupture of the disk in a patient with a predisposition or higher risk of such rupture because of the previous disk surgery.[8]

After physical therapy, claimant participated in a functional capacity evaluation (FCE) on October 10, 2012. The FCE showed claimant could lift and carry around 20-25 pounds, he should use proper body mechanics, and avoid repetitive bending, lifting and twisting his back. Dr. Manguoglu adopted those restrictions. Dr. Manguoglu released claimant from treatment on October 22, 2012. After being released by Dr. Manguoglu, claimant's only treatment has been medication prescribed by his family physician.

Respondent was unable to accommodate claimant's work restrictions and his employment was terminated on October 30, 2012. Following his job loss, claimant applied for and received unemployment benefits for an unknown period of time.

On January 15, 2013, claimant was seen at his attorney's request by C. Reiff Brown, M.D., a board certified orthopedic surgeon. Dr. Brown noted claimant got along quite well between April 2011 and December 30, 2011. Physical examination revealed lumbar range of motion deficits. Claimant also had mild to moderate muscle spasm with movement, significant atrophy and weakness of the left leg, impaired L5 or S1 nerve roots and negative Waddell's signs. Dr. Brown diagnosed claimant with an L4-5 disk herniation from the December 30, 2011 accident.

Dr. Brown opined the December 30, 2011 accident was the prevailing factor in causing claimant's injury, need for medical treatment and resulting disability. In addressing permanent restrictions, Dr. Brown stated:

> It will be necessary for him to permanently avoid lifting above 30 pounds occasionally, 20 pounds frequently and all lifting must be done between waist and chest level with the spine in a neutral position. He should not lift from below knuckle level and he should not lift away from the body more than 14 inches. He should avoid flexion and rotation of the spine more than 20 degrees. He will have to alternately sit, stand, and move about the work place and times it may be necessary for him to recline.[9]

Dr. Brown also opined claimant will need medication in the future and may have intermittent flare-ups of back pain that will require a short course of physical therapy or other treatment. Dr. Brown indicated additional surgery should be avoided if possible.

---

[8] *Id*., Ex. 2 at 6-7.

[9] *Id*., Ex. 2 at 3.

On June 11, 2013, claimant returned to Dr. Stein at respondent's request. Claimant complained of continued pain in his lower back and left leg, with the back pain being worse than the leg pain. Claimant rated his pain as ranging from 8 to 10 on a 0-10 pain scale. Lumbar range of motion measurements were noted. Dr. Stein noted no lumbar paraspinal muscular spasm, muscle stretch reflexes were intact, lower extremity strength was intact in all muscle groups, no true atrophy was appreciated, there was no dermatomal sensory deficit and straight leg raising produced some lower back discomfort, but no radicular pain.

Dr. Stein recommended permanent work restrictions of: (1) no lifting more than 40 pounds with any single lift up to twice per day, 30 pounds occasionally, and no frequent, repetitive or continuous lifting; (2) avoid lifting from below knuckle height or above chest height; (3) avoid frequent or repetitive bending and twisting of the lower back; and (4) alternate sitting with standing or walking on an hourly basis if needed.

Doug Lindahl testified on November 27, 2013. Mr. Lindahl, a vocational rehabilitation counselor, interviewed claimant at his attorney's request and created a list of the tasks claimant performed in the five years before his December 30, 2011 accident. Mr. Lindahl testified:

> Q. All right. Just explain for us, if you would, the procedure that you followed to try to determine ability of [claimant] to earn wages in the open labor market.
>
> A. Sure, and I've kind of outlined that on Page 3 and 4 of my report. First thing you do is look at his work history, and even the jobs that he had prior to these jobs listed in the task list were assembly in nature, which would be beyond his current light-duty restrictions, so - - and they're not skilled enough to transfer into anything, so he basically would have to start from scratch looking for work.
>
> So I then get into a review of the labor market and start looking for jobs within a fifty-mile radius of his area, and as you can see from my report there doesn't appear to be anything close that's within his restrictions, and of course as I noted in the doctor's statement that he must alternately sit, stand and move about the workplace, at times it may be necessary for him to climb, maybe eliminates full-time work.
>
> Q. All right. So would it be your opinion based upon his age, physical capabilities, education, training and prior work experience and availability of jobs in the open labor market that there are no jobs in the labor market in [claimant's] labor market?
>
> A. Correct.[10]

[10] Lindahl Depo. at 9-10.

Mr. Lindahl testified claimant's restrictions prohibit him from working as a cashier, unless the position allowed him to alternate sitting, standing and moving about. Based upon claimant's age, education and work experience, Mr. Lindahl opined claimant is essentially and realistically unemployable, but he would improve his employment opportunities if he was willing to relocate or if he got his GED or additional training.

Dr. Brown testified on December 9, 2013. Dr. Brown stated claimant herniated his L4-5 disk due to his work on December 30, 2011, and such accident was the prevailing factor in causing his injury, medical condition and resulting disability. He acknowledged claimant's prior herniation at L4-5 made him more susceptible to a recurrent herniation and claimant's new injury would likely not have occurred if claimant's disk was normal. Of the 26 tasks identified by Mr. Lindahl, Dr. Brown opined claimant was unable to perform 17 tasks for a 65% task loss. Dr. Brown testified he would have given claimant lifting restrictions and restrictions against repetitive bending and twisting as a result of the April 2011 surgery. He also confirmed that any tasks requiring claimant to lift over 50 pounds or tasks requiring repetitive bending and twisting would already have been outside claimant's restrictions prior to his December 30, 2011 accidental injury.

At the time of the December 13, 2013 regular hearing, claimant was 47 years old. He reported having constant lower back and leg pain. While claimant is able to perform activities of daily living, he can no longer golf and normally just watches television. He applied for social security disability, but has not been approved.

Claimant completed the 10th grade and does not have a GED. He was a certified EMT, but his license expired. He has a commercial driver's license and a locksmithing advanced certification. He started a business as a locksmith before this injury, but has only worked on two occasions in which he opened locked car doors for $40 each time. He last performed such work six to eight months before the regular hearing.

Claimant applied for numerous jobs in Osborne and had two interviews, but has not been offered employment. While acknowledging his job opportunities would be better in a larger community, he is unwilling to relocate because his wife has been employed for over 15 years as a nurse at a local nursing home and his 7th grade son has always attended school in Osborne.

Dr. Manguoglu testified on January 13, 2014. Dr. Manguoglu testified claimant's December 30, 2011 work accident caused claimant's recurrent disk herniation at L4-5. Further, Dr. Manguoglu testified the accident was the prevailing factor in causing claimant's injury and need for medical treatment.[11] While Dr. Manguoglu acknowledged claimant was more susceptible to disk reinjury because of the prior surgery and the weakening of the disk, he testified 2-3% of patients have a recurrent disk herniation without trauma. Dr.

[11] See Manguoglu Depo. at 7-8, 10; see also Ex. 3.

Manguoglu agreed claimant's mechanism of injury could, but would rarely, cause a herniated disk in a normal back, and further it was more probable than not that claimant's accident would not have occurred but for the preexisting condition. Dr. Manguoglu did not agree the combination of claimant's prior herniated disk and subsequent surgery was the main factor leading to claimant's reherniation on December 30, 2011.[12]

Dr. Manguoglu testified claimant should alternate sitting, standing and walking. He agreed his October 6, 2011 note regarding restrictions said nothing about claimant needing to alternate sitting, standing and walking.[13] The doctor further agreed claimant's October 2012 restriction of no lifting over 25 pounds was different than his October 2011 restriction of no lifting over 50 pounds. Out of the 26 tasks identified by Mr. Lindahl, Dr. Manguoglu opined claimant was unable to perform 14 tasks for a 53.84% task loss. Dr. Manguoglu testified he probably would have basically given claimant the same restrictions now that he gave claimant in October 2011.[14] He agreed that any tasks on Mr. Lindahl's list that required claimant to lift over 50 pounds or perform repetitive bending or twisting would be tasks claimant should not have been performing after being released from treatment in October 2011 following his first back surgery.[15] Dr. Manguoglu testified claimant can work within the restrictions he provided.

Karen Terrill testified on January 23, 2014. Ms. Terrill is a rehabilitation consultant who evaluated claimant at respondent's request and drafted a list of 29 tasks claimant performed in the five years before his December 30, 2011 accident. Claimant told Ms. Terrill he viewed his locksmithing activity as more a hobby than as an income-producing job based on how few customers he has assisted. Claimant told Ms. Terrill he applied for 15 jobs without finding work. Ms. Terrill testified any tasks on the task list which fall within claimant's preexisting restrictions would need to be removed. In doing so, the tasks on her list would be reduced to 18 tasks. Based upon claimant's restrictions, Ms. Terrill opined he could work as a locksmith earning $11.58 an hour or a cashier, in which entry-level pay is $8.15 per hour and the average pay is $8.56 an hour. In reaching such conclusion, Ms. Terrill considered job availability in the "balance of the state."[16] Ms. Terrill could not identify any locksmith or cashier job openings within 50 miles of Osborne. She could not identify any specifically available job opening that claimant had the physical ability to perform. Ms. Terrill acknowledged claimant could not perform any of the jobs she identified claimant as having performed dating back to 1998.

---

[12] See *Id*. at 20.

[13] See *Id*. at 24-25.

[14] See *Id*. at 18, 22.

[15] See *Id*. at 18.

[16] Terrill Depo. at 27.

Dr. Stein testified on January 27, 2014. He testified claimant's work incident was causally related to claimant's disk herniation, but "absent the previous herniation and diskectomy, the incident at work would not have caused the disk rupture. On the other hand, absent the incident at work, the risk of having another rupture at that time was 5 to 10 percent, not 50 plus [percent]."[17] He stated:

> How you determine which is the primary factor, the prevailing factor here, I guess I was less sure of that after I got the additional information. I thought the primary factor was the fact that he had a hole in his ligament from the previous surgery and that it would not have ruptured had that not been present, but in terms of making an absolute statement, I'm not prepared to do that.
>
> Wishy washy.[18]

Dr. Stein agreed that whatever the condition of claimant's back prior to December 30, 2011, it was the lifting, twisting and straining that caused claimant's L4-5 disk to herniate.[19]

Using Ms. Terrill's task list, Dr. Stein opined claimant was unable to perform 15 of 29 tasks for a 51.7% task loss. When considering what respondent characterized as Dr. Manguoglu's preexisting restrictions for claimant and eliminating from the list any tasks claimant already would have been precluded from performing, Dr. Stein opined claimant suffered a 22.2% task loss based on inability to perform 4 of 18 remaining tasks. When analyzing task loss based on how claimant portrayed Dr. Manguoglu's preexisting restrictions, Dr. Stein testified claimant's December 30, 2011 accidental injury resulted in his losing the ability to perform 10 of the remaining 24 tasks for a 41.67% task loss.

If considering claimant had a 50 pound restriction prior to December 30, 2011 and using Mr. Lindahl's task list, Dr. Stein opined claimant's accidental injury caused him to lose the ability to perform 10 of 21 tasks for a 47.6% task loss. After cross-examination and eliminating from consideration EMT tasks which would require claimant to lift heavy patients, Dr. Stein testified claimant's accidental injury resulted in his losing the ability to perform 7 of 18 pre-injury tasks identified by Mr. Lindahl for a 38.8% task loss.

Dr. Stein testified he did not have an opinion regarding whether claimant is permanently and totally disabled and he would defer to vocational experts. Dr. Stein did, however, opine claimant was capable of work within his restrictions.

---

[17] Stein Depo. at 14; see also p. 33.

[18] *Id*. at 13; see also p. 32.

[19] *Id*. at 23.

The March 3, 2014 Award stated, in part:

Prevailing Factor

Respondent denies that the accident of December 30, 2011 was the prevailing factor in causing Claimant's injuries, need for treatment or resulting disability. The medical evidence before the court is largely in concert, however, that the December 30, 2011 accident caused the reherniation at L4,5.

. . .

The "relevant evidence" before the court establishes that Claimant had a previous injury at L4,5, and that he was susceptible to reinjury at that level. The likelihood of a reherniation of an operated intervertebral disc varies between the 2-3% suggested by Dr. Manguoglu, and 5-10% in literature reviewed by Dr. Stein. Claimant describes work activity and straining with his upper body that all of the testifying physicians agree was sufficient to, and did, cause a reherniation at L4,5. While Claimant's previous herniation is a significant factor, the likelihood of a reherniation at L4,5 was relatively remote, absent some trauma. The medical evidence presented concurs that the accident of December 30, 2011 caused the reherniation. **The court finds and concludes that the work activity Claimant engaged in on December 30, 2011 was the prevailing factor in causing his reherniation at L4,5.**

Nature and Extent of Impairment and Disability

. . .

Permanent Partial General "Work" Disability

. . .

With regard to task loss, the court has a wide array of opinions before it, some considering Dr. Manguoglu's pre-December 30, 2011 restrictions, and some that do not. Dr. Brown attributed all of his task loss estimate to the December 30, 2011 accident, mistakenly believing that Claimant was asymptomatic prior to that injury, and assuming that Claimant had no restrictions from Dr. Manguoglu. Dr. Manguoglu, after offering his opinion that Claimant had a 54% task loss, acknowledged that some of those tasks were contraindicated by his previous restrictions, imposed after the 2011 surgery, but did not offer an opinion as to how many tasks were specifically lost as a result of the December 30, 2011 injury. Dr. Stein reviewed the Lindahl task list and opined that Claimant's task loss attributable to the December 30, 2011 work accident was between 38% and 48%. Dr. Stein reviewed the Terrill task list and opined that Claimant's task loss attributable to the December 30, 2011 work accident was 22%. Giving equal weight to the 38%, 48% and 22% opinions, **the court finds and determines that Claimant has suffered a 36% task loss as a result of the December 30, 2011 work accident.**

. . .

Here, Claimant is not earning any wages. He argues that because there are no jobs within his restrictions within a reasonable commute, he is permanently and totally disabled.

. . .

If Claimant were to relocate to a larger metropolitan area, the vocational testimony establishes that he could likely find employment or self-employment as a locksmith, and that the duties of a locksmith would be within his permanent work restrictions. While there may not be any jobs within a reasonable commute of Osborne, Kansas, **K.S.A. 2011 Supp. 44-510e(a)(2)(E)** ***requires*** the court to impute a wage. The statute does not empower the court to find the claimant permanently and totally disabled simply because of the locale in which he lives. The only evidence before the court that would support an imputed wage is the testimony and written report of Karen Terrill. **The court will impute a wage of $9.43 per hour (an average of the hourly wages suggested for both the cashier and locksmithing positions), for a post-injury gross weekly wage of $377.20.** Comparing this imputed wage to the stipulated pre-injury average gross weekly wage of $525.73, **Claimant has suffered a wage loss of 28%.**

Averaging Claimant's task loss of 36% with his 28% wage loss yields a 32% permanent partial general "work" disability.

Future Medical

The only evidence before the court as to future medical comes from the testimony of Dr. Brown, who opined that future medical treatment in the form of medication, epidural steroid injections and physical therapy. Additionally, Claimant continues to receive prescription medication for his back pain.

. . .

It seems reasonably likely, given that Claimant has had two surgical procedures and continues on prescription pain medication, that he will require future medical treatment. His prescription medications will need to be renewed and monitored, and there is a likelihood of flare-ups requiring medical intervention. **Future medical will be considered upon proper application.**

Conclusion

Claimant suffered personal injury, by accident, arising out of and in the course of his employment on December 30, 2011, when his work activity caused a lesion or change in the physical structure of his body in the form of a re-herniation of L4,5. The work activity was the prevailing factor in causing the injury. He has suffered a 10% impairment of function to the body as a whole as a result of the December 30, 2011 work accident. Inclusive of his functional impairment, Claimant has suffered a 32% permanent partial general "work" disability**.**

Following the Award being issued, claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510e(a)(2) states, in pertinent part:

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(I) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors,

> including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

K.S.A. 2011 Supp. 44-510h(e) states:

> It is presumed that the employer's obligation to provide the services of a health care provider . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

From July 1, 1993 forward, the Board assumed the de novo review of the district court.[20] Board review of an administrative law judge's order is de novo on the record.[21] "The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made."[22] De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.[23]

"It is the function of the [Board] to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability."[24] The Board "is free to consider all of the evidence and decide for itself the percentage of disability."[25]

---

[20] See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P.2d 411 (1997).

[21] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[22] *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 39 P.3d 21 (2002); see also *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009) ("[D]e novo review . . . [gives] no deference to the administrative agency's factual findings.").

[23] *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009).

[24] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[25] *Id.* at 784.

ANALYSIS

1. Claimant's accident was the prevailing factor in causing his injury, medical condition and resulting disability and impairment.

Claimant must prove the work accident was the prevailing factor in causing an injury, medical condition and resulting disability or impairment. All of the testifying physicians noted claimant's December 30, 2011 work accident played a causative role in his injury and that someone with a normal back would likely not sustain a recurrent disk herniation.

A "but for" test to delineate the prevailing factor in causing an injury, medical condition and resulting disability is not in the statutory language. It is possible an injury would not occur absent a worker having a preexisting condition, but the work accident could still be the prevailing factor in causing the injury. It is also possible for a preexisting condition to be the prevailing factor in why an injury resulted, irrespective of a triggering event at work. The prevailing factor must be based on "all relevant evidence."

Dr. Manguoglu, who treated claimant before and after the December 30, 2011 accidental injury, provides the most credible prevailing factor opinion. He concluded the December 30, 2011 accident was the prevailing factor in the development of claimant's recurrent herniation at L4-5 and its sequella. Dr. Manguoglu specifically denied the combination of claimant's preexisting L4-5 injury and surgery was the prevailing factor in causing claimant's injury. The Board adopts Dr. Manguoglu's prevailing factor opinion.

2. Claimant sustained a 39.12% work disability.

The parties disagreed as to the extent of Dr. Manguoglu's restrictions for claimant following his initial low back surgery.

Claimant's restrictions increased between October 2011 and October 2012. Dr. Manguoglu testified regarding what restrictions he might typically provide a patient who had back surgery, including restrictions regarding no repetitive bending and twisting and to alternate positions. However, Dr. Manguoglu's October 6, 2011 note only restricted claimant against lifting over 50 pounds, without reference to bending, twisting or alternating sitting, standing and walking. Claimant's maximum lifting allowance went from 50 pounds in October 2011 to 25 pounds in October 2012. While Dr. Manguoglu testified he probably would have given claimant the same restrictions in October 2011 that he provided claimant in October 2012, the reality is that Dr. Manguoglu did not do so. Aside from the general recommendations claimant understood from Dr. Manguoglu – use proper body mechanics, keep his back straight, use his legs when lifting and not bend over to grab anything heavy – the only restriction for claimant to follow from Dr. Manguoglu in October 2011 was to not lift in excess of 50 pounds.

The Board could go through Mr. Lindahl's task list and attempt to ascertain what tasks would already have been eliminated based on Dr. Manguoglu's prior restrictions, but will not do so. As noted by the judge, Dr. Manguoglu did not offer an opinion as to how many tasks were specifically lost as a result of the December 30, 2011 injury. On the other hand, Dr. Stein did provide clear opinions regarding claimant's task loss using task lists from both vocational experts and assuming claimant had a prior 50 pound restriction. Dr. Stein provided a 41.67% task loss using Ms. Terrill's list and a 38.8% task loss using Mr. Lindahl's list. These figures average to being 40.24% The Board concludes claimant sustained a 40.24% task loss.

The Board further concludes claimant is not permanently and totally disabled. While Mr. Lindahl testified claimant is essentially and realistically unemployable, Ms. Terrill disagreed. No physician testified claimant is permanently and totally disabled or essentially and realistically unemployable. The physicians indicated claimant was capable of lifting between 25 and 40 pounds. Further, claimant should be allowed to alternate sitting, standing and walking, while avoiding repetitive bending and twisting. The physicians identified various specific tasks claimant is still capable of performing. The greater weight of the credible evidence demonstrates claimant is not permanently and totally disabled.

Instead, claimant is capable of earning a wage in the open labor market. The Act does not define "open labor market," but the term was previously analyzed in *Scharfe*,[26] in which the headnotes provide:

> 2. The "open labor market" means that group of jobs (1) in which employment opportunities routinely occur; (2) that are offered by several employers in an economic area; and (3) that are the types of jobs for which a worker seeking employment with the claimant's education, training, experience, and physical limitations would logically offer his or her services.
>
> 3. "Open labor market" means only that type of work or services a worker is offering which are generally performed in the geographic area in which the worker is offering them. The open labor market must be reasonably accessible, and workers are not required to move their residences or travel unreasonable distances to obtain such employment.

Given this prior construction of "open labor market," the Board disfavors Ms. Terrill's use of the "balance of the state" in determining claimant's employability. Potentially, such definition might mean all of Kansas and it is unreasonable to consider jobs geographically remote to claimant's residence.

---

[26] *Scharfe v. Kansas State Univ.*, 18 Kan. App. 2d 103, 848 P.2d 994 (1992).

After reviewing the factors listed in *Scharfe* and consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market, the Board concludes claimant is capable of work in his geographic area.[27] The Board finds claimant is able to earn entry-level wages, such as those paid to a cashier, which is $8.15 per hour or $326 per week. This results in a 38% wage loss as compared to claimant's $525.73 average weekly wage.[28] The Board does not conclude claimant can realistically earn higher wages as a locksmith in the open labor market, especially considering the sporadic nature and lack of work claimant actually obtains from such activity.

K.S.A. 2011 Supp. 44-510e(a)(2)(E) establishes that "where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence." Claimant argues his actual post-injury earnings of $80, when averaged out over time to equal $2.50 per week, should be considered his post-injury average weekly wage. Claimant has not done any locksmithing jobs for six to eight months prior to the regular hearing. He is not engaged in post-injury employment for wages.

Averaging claimant's 40.24% task loss and 38% wage loss results in claimant having a 39.12% work disability.

3. Claimant is awarded the right to seek future medical treatment.

The Board affirms the judge's conclusion on this issue.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board concludes:

1. claimant's December 30, 3011 accident was the prevailing factor in causing claimant's injury, medical condition, and resulting disability or impairment;

2. claimant proved a 39.12% work disability; and

3. claimant may seek future medical treatment as a result of this injury.

---

[27] The Board defers from defining the "open labor market" in terms of a clear-cut radius from an injured worker's residence.

[28] Claimant's average weekly wage prior to November 1, 2012 was $378.70, but it increased after that date to $525.73 based on his fringe benefits being discontinued.

AWARD

WHEREFORE, the Board modifies the March 3, 2014 Award.

The claimant is entitled to 41.71 weeks of temporary total disability compensation at the rate of $252.48 per week or $10,530.94 followed by 2 weeks of permanent partial disability compensation at the rate of $252.48 per week or $504.96 followed by 149.9 weeks of permanent partial disability compensation at the rate of $350.50 per week or $52,539.95 for a 39.12% work disability, making a total award of $63,575.85.

As of July 23, 2014 there would be due and owing to the claimant 41.71 weeks of temporary total disability compensation at the rate of $252.48 per week in the sum of $10,530.94 plus 2 weeks of permanent partial disability compensation at the rate of $252.48 per week in the sum of $504.96 plus 90 weeks of permanent partial disability compensation at the rate of $350.50 per week in the sum of $31,545 for a total due and owing of $42,580.90, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $20,994.95 shall be paid at the rate of $350.50 per week for 59.9 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of July 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jeff K. Cooper
jeff@jkcooperlaw.com

Jeffrey E. King
jeking@hamptonlaw.com; wcgroup@hamptonlaw.com

Honorable Bruce E. Moore